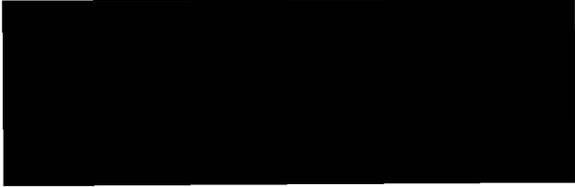


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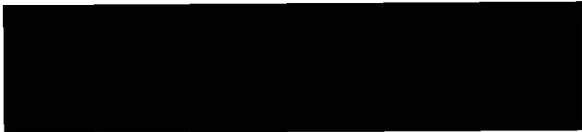
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File: EAC 08 112 50917 Office: VERMONT SERVICE CENTER Date: **OCT 29 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Texas corporation, states that it operates a private equity and investment banking business. The petitioner claims to be an affiliate of New Capital Private Equity, SC, located in Mexico. The beneficiary was initially granted a one-year period in L-1A classification to open a new office in the United States and the petitioner now seeks to employ him for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded it to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will serve in an executive capacity and "manage several major components and functions of the organization." Counsel asserts that the director improperly denied the petition on the basis that the beneficiary is the sole employee on the petitioner's payroll and failed to take into account the beneficiary's actual duties and responsibilities. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed the nonimmigrant petition on March 11, 2008. The petitioner indicated on Form I-129 that its private equity and investment banking company was established in 2006 and has one employee in the United States.

On the L Classification Supplement to Form I-129, the petitioner described the beneficiary's proposed duties as follows:

As President, he will continue to work as Managing Partner and continue to perform investment banking, private equity placements for real estate residential housing and low income housing for large corporations. [The beneficiary] will provide advice regarding the purchase companies in the industrial real estate sector. He will set quality standards for the work, establish general guidelines that are followed and executed by employees, and exercise wide latitude in discretionary decision-making.

In a letter dated February 28, 2008, the petitioner provided some background information regarding the petitioner's operations as "a manager of private equity investments." The petitioner provided the following explanation:

Our functions are twofold: on one hand, we identify a business opportunity in previously defined and targeted sectors, we joint-venture with operating partners and on the other we provide the equity and debt to carry on the business, which means that we have a broad base of existing and previous investors that provide us with investment capital to finance business opportunities.

Due to the nature of our business, we form different vehicles of investment for each investment we make. For example, in a real estate project we are developing in the Medical Center in Houston, we formed two companies, a Limited Partnership (LP) and a General Partner (LLC). In the first one we contributed equity, the company borrowed debt and is the one operating the project. The second one serves as the operating partner of the LP. [The petitioner] has an equity participation in both companies.

The same letter also included a description of the beneficiary's "executive duties":

As President and CEO of [the petitioner], the beneficiary has full responsibility to oversee and direct, together with the company's operating partners, the strategy for the development of the business in two different stages.

In the first stage, based on the analysis that the operating partners have provided, he determines the viability of the business, the financial conditions under which it should be carried on, the key factors that have to be watched over to ensure its proper development, and the issues to be reinforced by the operating partners during the process. At the same time, as President and CEO of [the petitioner], [the beneficiary] presents the opportunity to [the company's] investors, addresses their concerns and receives its commitments. Based on the work and reports of legal, financial and field advisors, [the beneficiary] determines the best structure to carry on the business and supervises the operating partner in the negotiations with suppliers and clients. He also supervises the closing of the deal.

In the second stage, [the beneficiary] holds periodic meetings with the operating partners to supervise the development of the project, either through informal meetings or Board of Directors meetings. We determine strategies, alternative solutions to different situations that arise and set financial and operating goals for the business. We also hold Board of Directors meetings with the investors, as to inform them on the development of the business and its perspectives.

[The beneficiary] does not perform any direct operational or administrative job duties. Operating and administrative functions are carried out by the US and the foreign offices of the companies and by the operating partners. In the US, our operating partner employs four people as well as several legal, financial, and tax advisors. In Mexico, operations are conducted by a Construction Director, a Sales Director together as well as by our operation partners and their advisors.

The director found the initial evidence insufficient to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, on March 18, 2008, the director issued a request for evidence (RFE) instructing the petitioner to submit evidence to show that the company has grown to be of sufficient size to support managerial or executive position. The director requested an organizational chart, a list of the U.S. company's employees by name and position title, and a complete position description for each employee, including the beneficiary. The director also instructed the

petitioner to provide a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis.

In response to the RFE, the beneficiary submitted the following description of his position:

[The beneficiary's] job is to oversee, direct, give strategic guidance and leadership to various organizations and people that, conjunctly, are necessary to carry on the development of real estate housing projects. My job is to coordinate and direct the efforts so that each party involved does its job in a more efficient sense for the projects.

My basic relationship is with my operating partners and investors. My operating partners have all the experience in the management of these projects so there is not need for me to get involved in the day to day execution of the projects, neither in the details or in the execution process.

During weekly meetings with my operating partners, and more often if necessary, we determine the strategic steps that are necessary to assure our goals, we identify the risks associated with each decision and the opportunities of each part of the process. During the rest of the week, the operating partner is in charge of meeting with each operating party to execute the different tasks, therefore I only oversee the correct execution of the strategy and its accordance with the set goals. 90% of my time is devoted to strategic guidance and overseeing the projects and 10% to analyze new proposals for new projects.

* * * *

My operating partner has, directly, a business development manager and an accounting responsible, but all the jobs that are created at the legal counsel, tax counsel, sales brokers, architect and design groups and at the bank that lends us the money are also most importantly as a result of a successfully planned and executed project.

I . . . have the basic executive capacity and responsibility of make [sic] the projects be profitable for my investors, for my operating partners, for creating wealth for the employees and suppliers and the community by establishing the goals of the projects and the strategy that we will follow to achieve such goals. Later on, my responsibility is to oversee the achievement of such goals at a partners or directors level, while my operating partners carry on the day to day execution of the deals.

In a separate statement, counsel for the petitioner further addressed the beneficiary's role within the company, noting that an individual who manages an essential function can qualify for L-1A status as a function manager. Counsel further stated:

[The beneficiary] is the President, owner and CEO of [the petitioner]. He is employed by the organization in an executive capacity. He directs the organization. His function is to direct the

company's investment strategy and supervise its execution. Stated differently: "*He who has the gold makes the rules.*" [The beneficiary] obtains the money from investors who trust that he will make their money grow. He then provides money to companies and directs the execution of the investment strategy to ensure profitability and a return on investment. . . .

Companies then use this money to hire staff that will produce the product or service. [The beneficiary] is only interested in telling the company what to do. [The beneficiary's] financing creates jobs but he is not directly involved in managing the company's staff or the non-managerial, day to day operations involved in producing the product. Companies can hire and fire personnel at will.

With respect to the company's employees, counsel statement that the beneficiary "provides money so other companies can create jobs." Counsel noted that the petitioning company "only uses outside consultants." Counsel emphasized that the beneficiary manages a function of the organization, and "has provided money to companies and directs them."

Counsel further emphasized that the instant petition is for an extension of the beneficiary's previously approved L-1A status, noting that USCIS has instructed its adjudicators through a 2004 memorandum to give deference to prior approvals unless it is determined that there has been a material error, a substantial change in circumstances or there is new material information that adversely impacts the petitioner's or beneficiary's eligibility.¹

The petitioner also submitted a "company structure" chart depicting the beneficiary and an "operating partner," [REDACTED] at the "partners level" and a number of employees or consultants reporting to Mr. [REDACTED] in the areas of business development legal, tax, banks/government, accounting, architecture/design, sales and "independent contractor."

The petitioner's response included a letter from [REDACTED] who states that he is president of "Studio Z Homes," and noted that he and the beneficiary "decided to joint venture" a 16-unit project in the medical center area of Houston. Mr. [REDACTED] stated that the petitioner "is an investor in the LP formed to develop the project, brought the necessary equity capital to finance it, and is a partner in the LLC that develops the same." He stated that he shares his office space with the petitioning company. The petitioner submitted photographs of a building identified as "project near [the petitioner's] office funded by the petitioner."

The director denied the petition on May 16, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. The director acknowledged the organizational chart submitted, but noted that the petitioner failed to submit

¹ See Memorandum of William R. Yates, Associate Director for Operations, U.S. Citizenship & Immigration Services, *The Significance of a prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004)(hereinafter "Yates memorandum"). As will be discussed, the memorandum specifically states that the "material error" review does not apply to L-1 new office extension petitions. *Id.* at p.2, fn 1.

documentary evidence such as contracts for the various services it claims to contract from outside providers. The director further noted that the petitioner failed to submit descriptions of the positions within the company, and noted that the beneficiary appears to be the sole employee, thus suggesting that the beneficiary would not be relieved from performing the non-managerial day-to-day operations of the company. The director concluded by noting that having discretionary authority and a managerial or executive title such as president does not mean that a person is employed in a qualifying managerial or executive capacity for the purposes of the L-1A visa classification.

On appeal, counsel contends that the beneficiary will be employed in an executive capacity and asserts that USCIS's focus should not be "on the size or relative success of the organization, but rather, on what the executive actually does." Counsel contends that the sole employee of a company may qualify as an executive or manager for L visa purposes, "provided his or her function is to play, organize, direct, and control an organization's major functions through other people." Counsel states that the beneficiary performs a number of complex duties that fall under the statutory definition of "executive capacity," including:

- Overseeing and directing business development strategies in conjunction with the company's operating partners;
- Determining the viability of business investment opportunities;
- Establishing conditions under which to accept certain projects;
- Establishing policies to be reinforced by operating partners during business processes;
- Determining general business policies and operating procedures;
- Supervising client negotiations with operating partners;
- Approving the final closings of business deals;
- Conducting periodic meetings with the company's operating partners and the Board of Directors to assess the development of various projects; and
- Holding meetings with the Board of Directors and company investors in order to update them on business development and perspectives.

Counsel asserts that the petitioner's "operating partners" are "mainly outside consultants whom [the beneficiary] directs and supervises in developing investment projects and negotiating with clients." Counsel emphasizes that project management and development and client negotiations are the petitioner's major functions, and that by overseeing these activities, the beneficiary "effectively manages these major components and functions of the organization."

Counsel also contends that the director unfairly and disparagingly commented that the petitioner's office is located in a house rather than a traditional office building. Counsel emphasizes that the petitioner's "sole role is to acquire capital and monitor how the companies it creates or partners with are performing to its satisfaction." Counsel also notes that the beneficiary does not originate bank loans, build homes, sell homes, or have any one directly reporting to him "except the CEO of those companies." Counsel concludes by stating that the petitioner, through its funding, has created 100 or more jobs in the construction industry, and contends that there is nothing in the regulations requiring that these workers be on the petitioner's payroll.

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Here, while the beneficiary would evidently exercise discretion over the business as its president, owner and apparently its only employee, the petitioner has not established that his actual duties will be primarily managerial or executive in nature.

The petitioner has provided a broad and nonspecific description of the beneficiary's duties indicating that he devotes 90 percent of his time to "strategic guidance and overseeing projects," and 10 percent of his time to "analyze proposals for new projects." The petitioner indicates that the beneficiary relies on "operating partners" and their employees, "legal, financial and field advisors," tax advisors and other external resources who perform all operational and administrative functions associated with the business. The petitioner states that the beneficiary "supervises the operating partner in the negotiations with suppliers and clients," "supervises the closing of the deal," and explains that there is no need for the beneficiary to be involved in the day-to-day execution or details of the petitioner's projects. While the position description provided by the petitioner describes general managerial or executive functions, the petitioner's claim fails on an evidentiary basis, as the petitioner has not adequately documented the existence of the operating partners, joint ventures, projects or investments the beneficiary is claimed to oversee at an executive level. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

For example, the petitioner stated that it forms "different vehicles for investment," and that, for one particular project, it has created a limited partnership and a general partnership, with an "equity participation" in both companies. The record is devoid of any evidence related to these newly formed companies or the petitioner's investment in them. The petitioner identifies ██████████ as its "operating partner." Mr. ██████████ has provided a letter in his capacity as the petitioner's landlord, in which he confirms the petitioner's participation in the above-referenced limited partnership and limited liability company. However, without reviewing the partnership documents, operating agreements and other relevant corporate documents, the AAO cannot conclude that the petitioner's degree of investment and management control in these companies is such that it essentially grants the beneficiary the claimed executive authority over the companies carrying out the construction projects. The petitioner's documentary evidence of its business activities is limited to photographs of residential construction projects at unknown locations, with no evidence that would link these

projects to the petitioning company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, although the petitioner claims that the beneficiary devotes 90 percent of his time to "strategic guidance and overseeing projects" that have not been documented for the record, it is evident that he would be required to devote a significant proportion of his time to raising capital from investors. The beneficiary's responsibility for presenting opportunities to potential investors, addressing their concerns and securing their financial commitments has not been shown to be managerial or executive in nature. To the contrary, such responsibilities are the operational tasks inherent to the petitioner's business as a private equity and investment company. It is unclear how much time the beneficiary actually devotes to such tasks, as the petitioner did not provide the requested detailed breakdown of how the beneficiary allocates his time on a weekly basis.

The fact that the beneficiary is not directly involved in securing loans, or building and selling houses, does not lead to a conclusion that his duties are primarily managerial or executive in nature. The petitioner's primary function appears to be to raise and invest capital, and the beneficiary, as the petitioner's only employee, is solely responsible for performing these services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel has provided an updated list of duties on appeal that is even more ambiguous than descriptions provided previously. Counsel states that the beneficiary is responsible for "overseeing and directing business development strategies," "establishing policies to be reinforced . . . during business processes," and determining general business policies and operating procedures, as well as "supervising client negotiations with operating partners," and "approving the final closings of business deals." The petitioner does not further elaborate as to the nature of the "client negotiations" or "business deals," nor explain what specific tasks the beneficiary performs related to strategy and policy-making. Counsel's description of the beneficiary's duties also fails to mention the beneficiary's responsibility for locating and securing investors, a duty that has not been shown to be managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

Overall, the position descriptions provided fall significantly short of articulating the beneficiary's day-to-day responsibilities, such that they could be classified as primarily managerial or executive in nature. The petitioner cannot rely on vague characterizations and conclusory assertions to establish the beneficiary's employment in a managerial or executive capacity.

Moreover, the petitioner's description of the beneficiary's duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary's duties represents a credible perspective of the beneficiary's role within the organizational hierarchy. As observed above, the record is devoid of evidence that would establish that nature and extent of the petitioner's business activities, and its relationships with the claimed operating partners, consultants, and advisors who allegedly relieve the beneficiary from performing any operational or administrative tasks. If the petitioner is carrying out its business by investing capital in subsidiaries and partnerships with other entities, it is reasonable to expect the petitioner to document these activities and to provide evidence that definitively establishes the petitioner's and beneficiary's role in the projects. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The only evidence the petitioner provided was a self-prepared business plan dated subsequent to the date of filing and photographs of unidentified construction projects.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

Furthermore, in reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In the instant matter, the petitioner has not demonstrated that it has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner asserts that the beneficiary has no direct subordinates but instead manages the essential functions of the petitioning organization, which is "to invest capital and create new companies or give capital to existing companies." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii).

The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed description of the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. In the case of a function manager, where no subordinates are directly supervised, these other factors may include the beneficiary's position within the organizational hierarchy, the depth of the petitioner's organizational structure, the scope of the beneficiary's authority and its impact on the petitioner's operations, the indirect supervision of employees within the scope of the function managed, and the value of the budgets, products, or services that the beneficiary manages.

Here, the argument that the beneficiary is managing an essential function rests entirely on the petitioner's and counsel's unsupported assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The claim that operating partners, advisors and consultants, and employees of unidentified partner or subsidiary companies are actually carrying out all administrative and operational tasks inherent to the business has not been supported by documentary evidence. Furthermore, counsel indicates on appeal that the petitioner's "sole role is to acquire capital and monitor how the companies it creates or partners with are performing." The limited evidence in the record suggests that the beneficiary himself is solely responsible for the acquisition of capital and all monitoring functions, and the petitioner has not shown how the beneficiary's duties in this regard rise to the level of managerial or executive duties.

Finally, counsel asserts on appeal that the beneficiary will be employed in an executive capacity based on his oversight and decision-making authority with respect to the petitioner's claimed investment vehicles. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have subordinate employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise

as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* A beneficiary's "control," management or direction over a company cannot be assumed or considered "inherent" to his position merely on the basis of broadcast job responsibilities. Here, the petitioner has not sufficiently documented the beneficiary's duties or the complex organizational hierarchy of partner companies, projects, consultants and advisors he is claimed to direct. The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in an executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987).

The petitioner has not submitted evidence on appeal to overcome the director's determination that the beneficiary will not be employed in a managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that it is eligible for an extension of the initial one-year "new office" validity period. As previously noted, the regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides strict evidentiary requirements that the petitioner must satisfy prior to the approval of this extension petition. Upon review, the petitioner has not submitted evidence that the United States entity has been doing business for the previous year as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H), nor has it submitted evidence of the financial status of the U.S. company. *See* 8 C.F.R. §§ 214.2(l)(14)(ii)(B) and (E). The record contains no financial information where requested on Form I-129, no financial or banking records, no contracts or invoices, and no financial statements or tax returns. For these additional reasons, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The AAO acknowledges counsel's argument made in response to the RFE that the instant matter is a request for an extension of the beneficiary's previously approved L-1A classification petition. However, counsel's reliance on the Yates memorandum and arguments that deference should be given to the prior approval are not persuasive. First and foremost, the memorandum specifically states that it does not apply to L-1 new office extension petitions like the case at hand. Memo at p.2, fn. 1. In the prior petition, the petitioner indicated that it was a new office, and the petition was adjudicated under the relevant regulations for new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). In the present matter, the petitioner is no longer a new office, and the regulation at 8 C.F.R. § 214.2(l)(3)(v) does not apply. As the petitioner is requesting a first extension after the opening of a new office, the petitioner must now satisfy its burden under the regulation at 8 C.F.R. § 214.2(l)(14)(ii) in order to establish eligibility. Accordingly, the fact that the petitioner is no longer a new office, and is now requesting a first extension after opening a new office, represents a changed circumstance. In fact, the director had a duty to carefully examine the present petition and render a full adjudication, as the petitioner has new regulatory requirements in the present proceeding that did not apply to the prior petition.

See 8 C.F.R. § 214.2(l)(14)(ii). The memorandum does not apply to new office extensions. The director's close analysis and detailed request for evidence were appropriate in light of the referenced memorandum and the petitioner's evidentiary burden. The AAO further notes that the Yates memorandum was directed to Service Center Directors and Regional Directors. The referenced memorandum is not binding on the AAO.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.